

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON

## TRANSCRIPT OF PROCEEDINGS

IN RE: ETHICON, INC., PELVIC REPAIR  
SYSTEM PRODUCTS LIABILITY LITIGATION MDL NO.  
2:12-MD-2327

TELEPHONIC MOTIONS HEARING

January 3, 2014

BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE

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## PROCEDINGS

THE COURT: Hello. This is Judge Eifert.

MR. AYLSTOCK: Hi. Good afternoon, Your Honor.

4 This is Bryan Aylstock.

THE COURT: Hi, Mr. Aylstock.

6 MS. BAGGETT: Renee Baggett is also on. How are  
7 you doing?

THE COURT: Fine. How are you?

MS. BAGGETT: Very good. Thank you.

10 THE COURT: Who else do we have?

11 MR. GAGE: Judge, I thought I would let the  
12 plaintiffs finish before the defendants.

13 MR. FREESE: Your Honor, Richard Freese on behalf  
14 of Ms. Lewis.

THE COURT: Anyone else on behalf of plaintiffs?

16 (No Response)

THE COURT: All right. Defendants?

18 MR. GAGE: Judge, this is William Gage. And I've  
19 got Ben Watson of my office with me. And I've also got  
20 Anita Modak-Truran of my office with me.

21 MR. BERNARDO: And you also have Rich Bernardo  
22 from Skadden for defendants. Good afternoon, Judge.

THE COURT: Good afternoon.

24 Is there anyone else?

25 (No Response)

1                   THE COURT: Let me make sure, then, that the court  
2 reporter, Ms. Cook, is on the line.

3                   COURT REPORTER: Yes, I'm here, Judge.

4                   THE COURT: All right. Thank you.

5                   Well, who would like to go first?

6                   MR. AYLSTOCK: I would, Your Honor. This is Bryan  
7 Aylstock again for the plaintiffs. And I did want to  
8 introduce the Court to Rich Freese. Mr. Freese is counsel  
9 of record and represents Ms. Lewis, Carolyn Lewis who is the  
10 first bellwether Ethicon trial.

11                  And we do have an issue that has arisen and  
12 unfortunately couldn't be resolved with regard to the  
13 completion of the deposition of Dr. Boreham, B-o-r-e-h-a-m.

14                  Dr. Boreham is the implanting physician for Ms. Lewis.  
15 And her deposition was taken back in July pursuant to the  
16 order with regard to working up the pool of bellwether  
17 cases. Mr. Freese took the deposition. It began late and  
18 did not complete. In fact, there were a couple hours left  
19 on the seven hours under the Federal Rules.

20                  And in addition to that, there's been documents that  
21 have been produced since then that are directly relevant  
22 and, in fact, contradict the testimony of Dr. Boreham in  
23 there about contacts with sales reps and so forth.

24                  And in the interest of moving things along in the  
25 trial -- we know that the Judge is very interested in

1 keeping these trials to a minimum. What we would like to do  
2 is get some additional time with Dr. Boreham, complete the  
3 discovery deposition, and have a short *de bene esse*  
4 deposition so that we can present her testimony in the best  
5 form possible and understandable way for the Court,  
6 particularly in light of some of these, these documents that  
7 were produced and, and I think need to be examined with,  
8 with Dr. Boreham.

9 As I understand it, Ethicon has refused to allow the  
10 completion of that without an order of this Court. And we'd  
11 ask that an order be entered allowing us to complete her  
12 deposition.

13 THE COURT: All right. Who wants to speak on  
14 behalf of the defendants?

15 MS. MODAK-TRURAN: Your Honor, this is Anita  
16 Modak-Truran. I was at the deposition of Dr. Boreham and  
17 I'm prepared to speak on that.

18 The deposition of Dr. Boreham lasted six hours and 22  
19 minutes. The deposition was completed. None of the parties  
20 ever asked to keep the deposition open. That deposition  
21 went from 3:25 to 9:47 with the majority of the time being  
22 spent by plaintiff's counsel on all sorts of documents.

23 We do not agree, Your Honor, to an additional  
24 deposition because, one, the Federal Rules do not make a  
25 distinction between a discovery deposition and a *de bene*

1 esse deposition. And in this case, Mr. Freese recognized  
2 that during the deposition when he informed Dr. Boreham that  
3 her deposition could possibly be used at trial. So, we  
4 don't think that argument makes any sense.

5 The other thing is that Dr. Boreham has not seen the  
6 plaintiff since January of 2010. All of the medical records  
7 had been produced before her deposition. We are not aware  
8 of any new records concerning Dr. Boreham's treatment and  
9 care of Mrs. Lewis.

10 Pursuant to the orders entered into this case, we filed  
11 a dispositive motion on December 12th where we moved for  
12 summary judgment based on the learned intermediary theory.

13 We've asked plaintiff's counsel what additional  
14 documents they wanted to ask Dr. Boreham about, but they've  
15 never been able to identify them to us. We don't understand  
16 why this request was not made before we filed our  
17 dispositive motion.

18 And based on this Court's opinion in *Jones vs. Bard*, we  
19 believe this Court, based on the same analysis, should deny  
20 that request.

21 We also have Pre-Trial Order 38 which states that  
22 absent exigent circumstances, there shall not be a repeat  
23 deposition of a witness. And, certainly, we have not seen  
24 or heard any reason why the plaintiffs want to have a repeat  
25 deposition of Dr. Boreham, particularly after we've already

1 filed the dispositive motion based on her testimony.

2 THE COURT: Mr. Aylstock.

3 MR. AYLSTOCK: I'll, I'll let Mr. Freese respond  
4 to the particulars of the deposition, as well as the  
5 documents that were received, and just remind the, the Court  
6 that we -- I think it's been made clear when documents are  
7 produced after the fact that, that they're on a deposition,  
8 that that's an exigent circumstance. But if I could  
9 introduce Mr. Richard Freese to the Court.

10 THE COURT: Right. But let me clarify one thing  
11 that you just said. That's not what I've said. I've said  
12 that if you depose, for example, a corporate representative  
13 or someone employed by the company or someone they've put up  
14 as a fact witness and you've taken that deposition and then  
15 they've produced, meaning the defendant has produced  
16 documents that are pertinent to that witness and that should  
17 have been produced before that could have been produced  
18 before, then I can understand giving you a second chance at  
19 a deposition.

20 Now, I understand Dr. Boreham is a treater. Is that  
21 right?

22 MS. MODAK-TRURAN: That's correct, Your Honor.

23 MR. AYLSTOCK: That's right. And just to make  
24 myself clear -- I'm sorry I was unclear -- these  
25 depositions, or these documents certainly should have been

1 produced eons ago. They were clearly within the request for  
2 productions propounded last July. But if I could just let  
3 Mr. Freese speak to that.

4 THE COURT: All right. And, and we are going to  
5 need to know what documents you're talking about because I  
6 don't know what documents the defendant would have that  
7 apply to a treating physician.

8 So, Mr. Freese, first let's talk about the deposition.  
9 When did this take place?

10 MR. FREESE: Your Honor, it was in July of this,  
11 of last year. I'm sorry.

12 THE COURT: July of 2013. And did it, in fact,  
13 last six hours and 22 minutes?

14 MR. FREESE: I, I think Anita is correct on that,  
15 yes, Your Honor.

16 THE COURT: And was it essentially completed at  
17 that time or did anyone request that it be left open?

18 MR. FREESE: Well -- and, Your Honor, I'm, I'm  
19 sorry. I haven't studied Dr. Boreham's deposition. But I'm  
20 certain that off the record -- if it's not on the record, I  
21 know off the record that Anita and I discussed that if any  
22 documents were produced that pertained to Dr. Boreham that  
23 were not yet produced, we would have to, you know, revisit  
24 her deposition.

25 I'm not saying Anita agreed to or disagreed with me at

1       the time. But I'm, I'm certain that, that the discussion  
2       was had because I have that discussion in every deposition.

3                  THE COURT: Now, tell me what documents we're  
4       talking about.

5                  MR. FREESE: Yes, yes, Your Honor. So, in, in  
6       September of this year, I guess four months or three, three  
7       or four months after Dr. Boreham's deposition -- I'm sorry.  
8       Let me give you some background first.

9                  Dr. Boreham essentially said, "Listen, I haven't read a  
10      TVT IFU in forever. I don't know any sales reps. I can't  
11      even remember any sales reps. I -- basically, this is what  
12      I do and I have nothing to do with Ethicon. I don't speak  
13      to Ethicon. I don't -- you know, I've looked at their  
14      documents in the past but, but I, you know, I didn't, I  
15      didn't read this IFU before I implanted Ms. Lewis."

16                 All right. Well, obviously, at that time, we took her  
17      at face value. And we had no documents to cross-examine her  
18      with. Yet, in September they produced documents that show  
19      that Dr. Boreham not only was a, a key figure of every  
20      implanting doctor in, in Texas but, in particular, at the  
21      Baylor Medical Center.

22                 She and her partner were a  
23      five-hundred-thousand-dollar, half-a-million-dollar prospect  
24      for TVT, and that they gave congratulatory letters to sales  
25      reps for reining in Dr. Boreham and converting her from,

1 from a TVT product -- or her partner from a Bard product to  
2 TVT and getting Dr. Boreham to buy more TVT products.

3 There's document after document after document showing  
4 repeated discussions between Dr. Boreham and Ethicon. And,  
5 in fact, Your Honor, at this time, Ethicon was trying to  
6 establish a world registry of, of TVT implanters.

7 And I won't argue what the purpose of that was. But,  
8 but, but Dr. Boreham never mentioned this. And, in fact, we  
9 now have internal e-mails showing that Dr. Boreham was  
10 actively seeking out Ethicon employees, trying to volunteer  
11 herself to be one of their recognized implanters so she  
12 could participate in their worldwide registry.

13 She was making requests for 300, 300, just for herself,  
14 brochures for the TVT product. Yet, in her deposition she  
15 said, "I don't ever use Ethicon stuff. I don't know any  
16 Ethicon people. I don't use their documents."

17 Yet, the regional manager writes the local rep and  
18 says, "Do you -- is this a mistake? Do you really want 300  
19 brochures?" "Yeah, Dr. Boreham wants 300 brochures."

20 So, there, there is such a disconnect, Your Honor,  
21 between what Dr. Boreham says that, that her contact was,  
22 what she knew, what she was reading from, from Ethicon, and  
23 what we now know from documents produced after her  
24 deposition that were clearly called for earlier.

25 And let me give you a, a specific case of why this is

1 important today.

2 I just read today Ethicon's reply to Dr. Peggy Pence  
3 who is our regulatory expert. And they're -- they quote at  
4 length Dr. Boreham in support of striking Dr. Pence saying,  
5 "Listen, Dr. Boreham didn't rely on anything Ethicon did.  
6 She didn't talk to anyone at Ethicon." They, they go to  
7 length to quote Dr. Boreham's July testimony saying that she  
8 basically had no contact whatsoever with Ethicon.

9 Yet, we now know as we sit here that that, that that,  
10 that the true picture is, is completely different, at least  
11 with respect to the documents. I don't know what she would  
12 say, but I would say, Your Honor, that, that I've got a,  
13 I've got a whole mess of questions I want to ask her about  
14 how to reconcile her testimony in July with this, this --  
15 obvious multiple contacts that both Ethicon and she had.  
16 And they're congratulating their reps on having such a great  
17 relationship and being the number one prospect and candidate  
18 to implant TVT products.

19 So, I could go on and on, Your Honor. But, I mean,  
20 there, there is a dozen or more documents that we found in  
21 September that clearly should have been produced before  
22 that. And Bryan can speak to the, to the number of  
23 documents that were produced.

24 But, you know, if they got produced in September, the  
25 fact that we found them just recently I don't guess is

1       unexpected. We review, you know, thousands of -- tens of  
2       thousands of documents all the time. And after Dr.  
3       Boreham's deposition had been taken, you know, there was an  
4       emphasis on, "Hey, I'm still finding Dr. Boreham documents."  
5       I mean, it was, it was quite by accident that we came across  
6       them.

7           And as soon as we came across them, we alerted them  
8       that, "Hey, we need to re-depose Dr. Boreham on this and on  
9       the question of whether or not there's a difference in the  
10       Federal Rules of discovery versus trial deposition." I  
11       mean, it's true. I said that to Dr. Boreham. I say that to  
12       every witness.

13           But it doesn't mean that, that, you know, one takes a  
14       deposition exactly the way you'd want the trial testimony  
15       to, to be taken. She's obviously outside the subpoena power  
16       of, of the, of the District Court in West Virginia. So, we  
17       have to rely on her deposition.

18           And in light of these new documents, with no  
19       explanation from the defendants why there's been such a late  
20       production, you know, we didn't think we were being unfair  
21       to them by, by asking for some additional time with Dr.  
22       Boreham, particularly when we didn't even take -- neither  
23       side got seven hours with Dr. Boreham.

24           THE COURT: Okay.

25           MR. FREESE: And I'll answer any question Your

1 Honor has.

2 THE COURT: Yes. Let me just stop everybody  
3 because you're going to have to bear in mind that I am not  
4 actively involved in the case. So, I don't really know how  
5 all of these various witnesses figure into the whole scheme  
6 of things. So, I need to start back at the beginning.

7 Dr. Boreham is a treating physician. Is that right?

8 MR. FREESE: Yes, Your Honor.

9 THE COURT: And is she, what, an explanting  
10 physician? Exactly what --

11 MR. FREESE: She's, she is the physician that  
12 implanted the TVT sling into Ms. Lewis in 2009.

13 THE COURT: Okay. So, she did implant the TVT  
14 product. But you're saying at her deposition she said she  
15 didn't use Ethicon products?

16 MR. FREESE: No. What she said is that, "I don't  
17 normally read any of their things. I don't talk to their  
18 reps. I don't rely on anything they tell me."

19 And this was all, this was all being set up by, by  
20 Ethicon to do exactly what Anita just said. And that was  
21 to, to, to move forward on a summary judgment on learned  
22 intermediary.

23 And now we find, now we find out not only was she  
24 actively involved with Ethicon, she was actively involved in  
25 soliciting to be in their trials, to get their

1 brochures on, on the TVT procedure. And we know what the  
2 brochures say.

3 THE COURT: Okay. Let, let -- take a breath.

4 MR. FREESE: I'm sorry, Your Honor.

5 THE COURT: Okay. So, Dr. Boreham testifies in  
6 July she's the implanting physician, last saw this woman in  
7 2010. She implants a TVT product, but she says that she  
8 never reviewed the IFU. She didn't read any of their  
9 literature. She really just kind of went on, on her own by  
10 the seat of her pants and implanted this, this, this device.

11 And, and Ethicon got all of that testimony out of her  
12 and used that as the basis of a, of a motion on, on the  
13 learned intermediary.

14 You're saying that --

15 MR. FREESE: That is correct.

16 THE COURT: All right. You're saying that after  
17 her deposition in September, Ethicon produced documents that  
18 essentially refutes what she says about her contacts and  
19 relationship and knowledge of Ethicon products and IFUs and  
20 so forth.

21 MR. FREESE: That's correct, Your Honor.

22 MR. AYLSTOCK: And if I -- I'm sorry, Your Honor.  
23 This is Bryan Aylstock. Just to add to that, these  
24 documents weren't produced in the context of Ms. Lewis's  
25 defense fact sheet at all.

1       As the Court will recall, the order on the defense fact  
2 sheet requires the defendants to produce documents related  
3 to physicians. These were documents that were buried in the  
4 millions of pages that we only discovered after the fact.

5           Some are back in September well after the deposition.  
6 Some were before. But none were produced along with the  
7 defendant's fact sheet which is really our only -- in fact,  
8 the order says we can't propound case specific  
9 interrogatories related to that. We have to rely on the  
10 defendant's fact sheet.

11          So, we found these documents in the haystack. Some  
12 were produced after the fact. Some we found after the fact.  
13 But that's correct, Your Honor.

14           THE COURT: All right. And now you want to go  
15 back and question her about, about her relationship with  
16 Ethicon and her knowledge of Ethicon based on these new  
17 documents.

18           MR. FREESE: Yes, Your Honor, and including the  
19 information contained in the brochures that she -- in her  
20 deposition she claimed she doesn't read them. And, yet, we  
21 have e-mails showing that she was asking for 300. And the  
22 regional manager was like, "Who asked for 300 brochures from  
23 us?" And they go on to this long explanation of how  
24 important Dr. Boreham is to them. And they say, "Oh, great.  
25 Well, here, you know, here it is."

1                   THE COURT: All right. I understand all that.

2                   So, the next question -- or the next issue that I heard  
3 come up was Ethicon is saying, "Well, okay. You got all of  
4 these things or had all of these things in September, never  
5 asked to re-depose her. In December we then file a motion.  
6 And now you've decided you want to re-depose her. And, so,  
7 isn't that unfair to Ethicon since you had between September  
8 and December to take her deposition again."

9                   Is that what you're saying, Ethicon?

10                  MS. MODAK-TRURAN: Yes, Your Honor.

11                  THE COURT: Okay. How do you respond to that?

12                  MR. FREESE: Well, Your Honor, we had no reason  
13 until we discovered these documents to ask to, to re-depose  
14 her. I mean, you know, --

15                  THE COURT: When did you discover them, sir?

16                  MR. FREESE: Bryan?

17                  MR. AYLSTOCK: It was within the last week or so,  
18 Your Honor. We were, frankly, prepping for this trial and  
19 working on the summary judgment.

20                  And, and I'd further respond that, again, the fact  
21 sheet requires that the defendants provide this information  
22 with the fact sheet. And it, it has a document request and  
23 that those sales call notes, all of the information related  
24 be produced.

25                  Now, Mr. Courts -- Paul Courts is the sales rep that

1 called upon Dr. Boreham. Mr. Courts's custodial file is  
2 largely incomplete and spoliated. It's gone. So, not only  
3 did we not have that file, we also did not have these  
4 documents produced with the defendant fact sheets.

5 So, it's a little bit disingenuous --

6 THE COURT: I, I -- yeah, I understand what you're  
7 saying. And I also think I heard you say that also in the  
8 context of replying to some other kind of motion, you sort  
9 of then saw this as being a bigger issue than you understood  
10 it to be.

11 MR. FREESE: Yes, Your Honor. Well, today, today  
12 they filed their reply to strike Dr. Peggy Pence, our  
13 regulatory expert. And the, the main thrust of their reply  
14 today is, "Hey, look at what Dr. Boreham said in July. She  
15 said she didn't know anything about Ethicon, didn't talk to  
16 anybody, didn't rely on anything. The last IFU she saw was  
17 2002."

18 Well, so, not only is it important to this learned  
19 intermediary summary judgment, it also goes to the heart now  
20 of what they're saying about what Dr. Pence should or should  
21 not be entitled to testify about as a regulatory expert.

22 THE COURT: All right. I understand that.

23 Now, let me ask Ethicon, how do you respond to their,  
24 their argument that you should have produced these things as  
25 part of the fact sheet?

1 MS. MODAK-TRURAN: Well, I went back and looked at  
2 the defendant's fact sheet and we didn't -- one of the  
3 questions asked: Did this physician ever have any Ethicon  
4 training? And it is undisputed that Dr. Boreham has never  
5 had any Ethicon training.

6 There's another question on the defense fact sheet that  
7 asks about other contacts. And we did identify documents  
8 that show that we had sales reps who were interested in Dr.  
9 Boreham as a TVT-Secur registry. And those documents were  
10 identified by Bates number.

11 And in the fact sheet we said, "There may be other  
12 documents in the documents we produced, but this is what we  
13 can do under this short timetable."

14 The second issue -- so, we did produce documents on  
15 that. And the fact that plaintiff chose not to bring those  
16 documents to the deposition is not Ethicon's issue.

17 THE COURT: Well, but were there, were there new  
18 documents produced in September?

19 MS. MODAK-TRURAN: There were additional documents  
20 produced in September along the same vein. But contrary to  
21 the representations made by plaintiff's counsel, none of  
22 these documents were communications between Dr. Boreham and  
23 the sales rep. These were communications between sales reps  
24 in trying to have Dr. Boreham participate in a TVT-Secur  
25 registry. That is not the product at issue here.

1       Let me give you some background about Dr. Boreham so  
2 you don't think that she's just using our product  
3 willy-nilly.

4       Dr. Boreham is a well-trained urogynecologist. She is  
5 the head of her department at Baylor University. Baylor's  
6 policy is that while -- she did testify and she was asked  
7 this by Rich extensively. She did say that Ethicon sales  
8 representatives came to see her. She said her policy and  
9 practice is that she does not rely on anything the sales  
10 representative does. And that's just like anything out of  
11 the ordinary for doctors and academic institutions.

12       Dr. Boreham has extensively published on mesh. She's a  
13 researcher of mesh products. She said that the reason why  
14 she uses TVT-Secur is because, one, she was trained on it  
15 during her fellowship and, second, because it is the most  
16 widely studied mesh in the world and it has the best safety  
17 profile.

18       She was specifically asked by Rich, who had extensive  
19 periods of time with her, whether or not she relied on any  
20 company literature. And she said, "No," that her pattern  
21 and practice as an academic doctor, as well as a clinician,  
22 is to find -- is to look at the study.

23       In fact, she said that she did not go to meetings where  
24 Ethicon or any other manufacturer was going because she  
25 wants to keep that kind of neutrality.

1       Now, did Ethicon want her to participate in some  
2 studies? Those e-mails definitely show that. She was asked  
3 about that. And she said, "I just don't remember," is what  
4 she said at her deposition.

5       These e-mails, Your Honor, will not change the  
6 substance of her testimony, which is that she, as an  
7 academic, as a leader, a key opinion leader in her field,  
8 she simply doesn't rely on manufactured data or, or the IFU,  
9 or the patient brochure.

10      She was asked whether or not she had given Mrs. Lewis a  
11 brochure. And she said, "If I have brochures, I give them  
12 to patients." She had no documentation that she ever gave a  
13 brochure to Mrs. Lewis. Mrs. Lewis testified that she never  
14 had a patient brochure.

15      So, patient brochures and IFUs are not in this case  
16 because we have a doctor who does her own research and study  
17 and has determined and said that she knew and understood all  
18 of the risks of TVT based on her fellowship training, as  
19 well as her own research, and that nothing would change her  
20 opinion.

21      We can get you a copy of the transcript, but you'll see  
22 that -- I'd say that three quarters of the time was spent by  
23 Mr. -- by Rich asking her about internal company e-mails  
24 about, "Did you know that Mr. Arnaud said this or that," and  
25 showing her MSDS sheets and all of these other things that

1       she had never seen. And she said none of those things  
2       changed her opinion that TVT was the best product.

3           Now, if plaintiffs really thought, if they really  
4       thought, Your Honor, that these documents they saw in  
5       September were going to change their opinions, then they  
6       should have brought that before we filed a motion for  
7       summary judgment.

8           Texas law happens to be very specific on learned  
9       intermediary, and this case fits within all fours within  
10      *Porterfield vs. Ethicon*. There is nothing that a second  
11      deposition can do that's going to undermine what's in the  
12      record.

13           So, I -- to be honest, Your Honor, I think the timing  
14      of this motion is suspect. It came after the fact, probably  
15      after they read *Porterfield* and realized, "Oh, my God, we  
16      don't have a case."

17           MR. FREESE: Well, Your Honor, --

18           THE COURT: If the, if the, if these documents are  
19      nothing more than e-mails between employees of Ethicon and  
20      they're not communications with the doctor, how would that  
21      change anything that she's already had to say?

22           MR. FREESE: Well, Your Honor, they would change  
23      it in a significant way because at first, it could help  
24      refresh her recollection about who she was talking to and  
25      what she was looking at for one.

1       Secondly, it may -- it becomes a credibility issue.

2           THE COURT: Well, but if I understood it, the  
3 documents that you're talking about aren't documents that  
4 directly involve this doctor. They're, they're sales reps  
5 that are communicating with each other about the doctor, or  
6 employees of Ethicon communicating about the doctor. But  
7 they're not, they're not e-mails to the doctor or from the  
8 doctor.

9           So, you're going to have to tell me what the documents  
10 are and, and whether or not Dr. Boreham is, is actually  
11 directly involved in those documents, if those documents  
12 show that she, she had an opinion about something or she  
13 communicated directly with someone or -- so, explain to me  
14 exactly what you've got.

15           MR. FREESE: Your Honor, --

16           MR. AYLSTOCK: Your Honor, this is Bryan Aylstock  
17 if I could just jump in.

18           The order for the 600 TTV patient brochures, that's  
19 critical to this case because their own, their own witnesses  
20 testify that these, although they're called patient  
21 brochures, are really intended for the doctor to have an  
22 informed discussion with the patient, and intended to  
23 communicate to the doctor the risk information so that  
24 doctor can discuss it with the patient.

25           She testified unequivocally, "Look, I didn't -- I don't

1 know. I, I never really use the brochures."

2 Well, that goes to her, her bias directly and what she  
3 knew from those brochures and what she didn't know from  
4 those brochures.

5 THE COURT: So, you have, what, a letter from her  
6 asking that some brochures be sent to her. You have, what,  
7 some written --

8 MR. AYLSTOCK: The description of an order in --  
9 for those brochures. There's also a sales call description  
10 describing a sales call with Dr. Boreham and how the sales  
11 rep has such a great relationship with her.

12 Ms. Modak went on and on with Your Honor about how  
13 unbiased and impartial and everything that Dr. Boreham is.  
14 Well, that's what's going to come across in this deposition.

15 But what the documents, we would submit, show is, in  
16 fact, she's making a lot, a lot of money on these products.  
17 She may be a mesh advocate and there may be a good reason  
18 for that, and that's her own bias for that. She, she's  
19 actively seeking work from Ethicon to be involved in their  
20 TVT registry and has a financial motivation to do that.

21 And why these documents were not supplemented on the  
22 defendant's fact sheet, why they weren't produced to begin  
23 with, there is a duty of supplementation. And, and what I'm  
24 afraid of is that if we don't have a little bit more time  
25 with Dr. Boreham, the jury is going to get the wrong

1 impression; in fact, a misleading, unjust impression of the  
2 true nature of this. And if, in fact, Ms. Modak's right,  
3 then the jury will see that too. But right now --

4 MR. FREESE: Your Honor, --

5 THE COURT: Yes.

6 MR. FREESE: Your Honor, if I can just add this.  
7 I think Anita just did a wonderful job of explaining to you  
8 what they intend to do with Dr. Boreham. And we know as  
9 we're sitting here on the phone that the plaintiffs, if we  
10 do our job, we can paint a very different picture of Dr.  
11 Boreham and her incentives and her motives and her bias and  
12 what she was doing and who she was talking to.

13 THE COURT: Right.

14 MR. FREESE: So, for, for Ethicon to be able to  
15 put on this picture of Dr. Boreham as an unbiased  
16 researcher, intellectual type who had no stake in the  
17 outcome of Ethicon or its products is really -- and, and  
18 then knowing that we actually have these documents in our  
19 back pocket with the inability to cross-examine her with  
20 them is really unfair to us.

21 THE COURT: Right. Now, let me ask you, how many  
22 documents are you talking about?

23 MR. FREESE: I'm aware of about a dozen.

24 Bryan, are there more than that?

25 MR. AYLSTOCK: That's how many we've found so far

1 just from, you know, searching the haystack.

2 THE COURT: Okay. Well, what I'm going to be --

3 (Interference)

4 THE COURT: I'm for some reason having some  
5 trouble with this conference call. Is anybody having  
6 trouble hearing?

7 MR. AYLSTOCK: I can hear you, Your Honor.

8 MR. FREESE: No, Your Honor. You're fine.

9 THE COURT: All right. What I am going to do is I  
10 am going to allow you some additional time to depose the  
11 doctor about these documents.

12 Now, I want to try to -- I want to try to set this for  
13 a reasonable amount of time. I'm not, I'm not thinking  
14 another seven hours.

15 So, let me ask you, how long do you think you need to  
16 depose Dr. Boreham about these documents?

17 MR. FREESE: I think the plaintiffs could do it in  
18 three hours easily, Your Honor.

19 THE COURT: Three hours for 12 documents?

20 MR. FREESE: Well, I'm, I'm -- I don't know what  
21 she's going to say. And I don't know whether or not Ethicon  
22 is going to have anymore documents. So, I, I certainly  
23 think we could do it in that. If Your Honor thinks we are  
24 entitled to less than that, then obviously we'll go with  
25 what Your Honor says.

1                   THE COURT: Right. I will, I will allow you two  
2 hours to depose her on these additional documents. And that  
3 I would be willing to extend if you find a whole lot more  
4 than 12 documents. But on these documents that you've found  
5 so far, two hours is long enough. And then I will also  
6 allow the defendant some time to ask questions.

7                   How long do you think you would need? Should I give  
8 you two hours as well?

9                   MS. MODAK-TRURAN: Just in case. But, Your Honor,  
10 what I don't want to happen -- and this is what I really  
11 think this deposition is about is I'm afraid that  
12 plaintiff's counsel will not stick to these documents; that  
13 they're going to try and attack other areas that have been  
14 creatively discussed at length and have nothing to do with  
15 these documents.

16                  So, if we could have something to protect us in that  
17 regard. I mean, if they want to ask about what internal  
18 sales reps -- the thing about her -- you know, you said that  
19 they can, they have that opportunity, but I don't want them  
20 all of a sudden to say, "Oh, no, at your last deposition you  
21 said that even knowing what this MSDS said, that it was  
22 still a safe product for Mrs. Lewis." I don't want them to  
23 be able to go ahead and ask that.

24                  MR. AYLSTOCK: Your Honor, we're not intending to,  
25 to go through an MSDS. We have limited time. I don't want

1 to get into a bunch of fights in the deposition about what  
2 we can and can't ask. We're professionals here and we know  
3 that.

4 MS. MODAK-TRURAN: I will tell you what --

5 THE COURT: What I think the deposition is  
6 supposed to be about is the additional documentation that  
7 the plaintiffs did not have before, and how that might  
8 affect her bias, her motives, or her prior testimony only,  
9 though, as it applies to whatever is on these various  
10 documents and her -- I guess her role with Ethicon, if there  
11 even is any real role. I don't know.

12 So, you know, that's not an invitation to allow the  
13 plaintiffs to rehash everything that's been, that's been  
14 said before. And I think everybody understands that to be  
15 the case.

16 So, I will allow it with limitations. It's to be about  
17 the new information that you have. And it's limited to two  
18 hours for plaintiffs, no more than two hours for defendant,  
19 those limitations. And --

20 MS. MODAK-TRURAN: Your Honor, could they  
21 identify -- they have refused consistently to identify these  
22 claimed documents. Can they provide us with a set of those  
23 documents by the end of the day?

24 THE COURT: Well, I'm not, I'm not going to  
25 require them to do that. I think -- unless they agree.

1 And, you know, you may want to agree in order to make  
2 everything speed up a little bit.

3 But I think they've told you what the documents  
4 involve, and they've told you the general date that they  
5 received them. You're the ones that produced them. You  
6 ought to be able to figure out what documents you have that  
7 apply to this doctor.

8 MS. MODAK-TRURAN: Your Honor, the Pre-Trial Order  
9 requires them to produce those documents within 48 hours.

10 THE COURT: Well, if there's an order that already  
11 says that, you know, then why are you asking me?

12 MS. MODAK-TRURAN: I, I was asking --

13 THE COURT: Whatever the rule -- whatever the  
14 Pre-Trial rule says, or Pre-Trial Order says. I haven't  
15 memorized all of them in every case. So, if there is, in  
16 fact, an order that you have to produce documents 48 hours  
17 before the deposition, then produce them 48 hours before the  
18 deposition.

19 MR. AYLSTOCK: Yes, Your Honor. We'll certainly  
20 abide by the rules.

21 MR. FREESE: Yes, Your Honor.

22 THE COURT: All right. Now, the other issue has  
23 to do with the evidentiary deposition. And I'm not going  
24 to -- I'm not going to allow you to take an evidentiary  
25 deposition. You know, I have problems with the whole way

1 these work in that everybody appears by deposition, but  
2 that's the way it is. And I don't see any reason to carve  
3 out an exception for this particular doctor, not to mention  
4 that once you do that, you're going to want to take  
5 evidentiary depositions on everybody. And, you know,  
6 certainly none of the Docket Control Orders, none of the  
7 prior rulings of the Court allow for that specifically. And  
8 nobody raised that as an issue at the outset of these cases.

9 So, I'm not going to grant that, that portion of your  
10 motion. You've got your two hours and that's what you get.

11 MR. AYLSTOCK: With regard to that, Your Honor,  
12 just so Your Honor is aware, I did raise that in one of  
13 the -- actually, I think the first -- actually, the second  
14 because I wasn't appointed at that time with Ms. Jones about  
15 the potential nature of some *de bene esse* depositions. And  
16 she, I believe on the record -- I can cite it -- I can find  
17 it I'm sure -- said that may be a possibility.

18 And, in fact, with regard to Dr. Klosterhalfen, I  
19 believe at Ms. Jones's, or at least Ethicon's own request,  
20 it was suggested that we do a *de bene esse* and that was  
21 agreed to.

22 So, I, I would hate that this transcript be cited, you  
23 know, as a hard and fast rule because I do think that, you  
24 know, there may not be a distinction in the federal rules,  
25 but this is a different animal.

1       And rule one, of course, says look for the just,  
2 expedient, and inexpensive resolution. And cutting up these  
3 depositions, which is what we've been doing the past week,  
4 it's becoming more and more apparent that, in fact, at least  
5 in some limited cases, particularly given that these  
6 witnesses are outside the subpoena power of the court, we  
7 may be coming to you to ask for that.

8       And I don't think that was foreclosed by Ms. Jones at  
9 the outset. In fact, I think she said the opposite; that  
10 depending on the situation, we may want to do that. And, in  
11 fact, for Dr. Klosterhalfen that was agreed.

12           THE COURT: Okay. Well, you know, I don't ever  
13 have a problem if you want to agree to do something. But  
14 you're not presenting any agreement to me sitting here  
15 today. You're asking me to order that there be an  
16 evidentiary deposition. And I'm not going to order that.

17           I also want to make it clear that what I order in these  
18 cases is specific to the circumstances that I am presented  
19 with at the time I'm making a ruling. So, there are no hard  
20 and fast rules that should be coming out of my various  
21 orders, these discovery orders because they're very specific  
22 to the circumstances as they're presented to me at that  
23 time.

24           Now, if you want to agree to take an evidentiary  
25 deposition, that's fine. There's nothing in the current

1 pre-trial orders that allows for that other than what you  
2 might agree to do unless there's good cause shown.

3 I don't see good cause in this case. To me, this is  
4 like any other treating physician. And I don't see any  
5 reason why this particular doctor needs to be treated  
6 differently than any of the other ones are.

7 So, you know, I'm not hearing any good cause for an  
8 evidentiary deposition of this particular witness. But I do  
9 think you are entitled to ask her your two hours of  
10 questions on these new documents that have been presented to  
11 you after her deposition was completed.

12 All right?

13 MR. AYLSTOCK: Thank you, Your Honor.

14 MR. FREESE: Thank you, Your Honor.

15 MS. MODAK-TRURAN: Thank you, Your Honor.

16 THE COURT: Anything else that we need to address  
17 today? And do I need to do an order on this or are we all  
18 on the same page?

19 MR. AYLSTOCK: If there is an order, I think that  
20 might be helpful just to make sure we get the cooperation we  
21 need from Dr. Boreham.

22 THE COURT: Do you have her deposition scheduled  
23 yet?

24 MR. AYLSTOCK: We have attempted to schedule it  
25 and she's represented and, and both -- we have not received

1 a date yet.

2 THE COURT: Okay, all right. Well, I will get the  
3 order out next week because I think it's unlikely I'll be  
4 able to get it out today since the clerk usually doesn't  
5 want any orders filed after 3:00. It's hard for them, I  
6 guess, to get everything docketed. So, this will be coming  
7 out next week. But that should still give you enough time  
8 to have it before you set the deposition.

9 All right. Thank you. Good-bye.

10 MR. GAGE: Judge, Judge, --

11 THE COURT: Yes.

12 MR. GAGE: This is William Gage. Bryan and I have  
13 a couple of remaining issues to discuss with Your Honor.

14 THE COURT: Okay.

15 MR. GAGE: But if I could excuse -- if I could let  
16 Ms. Modak-Truran go, Judge, I'll let her go.

17 THE COURT: Certainly.

18 MR. GAGE: Okay.

19 MS. MODAK-TRURAN: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. GAGE: Bryan, are you still on?

22 MR. AYLSTOCK: I am, William.

23 MR. GAGE: Okay. Good.

24 Judge, the other issue that we need to discuss with  
25 you, you know, Your Honor will recall we've got the

1 spoliation motion --

2 THE COURT: Right.

3 MR. GAGE: -- and our briefing is currently due on  
4 Monday. Our response -- defendant's response is due on  
5 Monday. And on I think it's December 27th plaintiffs filed  
6 a supplement to the motion. I think it's about a six-page  
7 supplement where they identified some additional issues  
8 where they allege spoliation has occurred.

9 So, we reached out -- I reached out to Bryan and asked  
10 whether he would be willing to agree on an extension. It,  
11 it made sense to us, Judge, that rather than filing a  
12 response and then filing a response to the supplemental  
13 motion, we would file one combined pleading which would be a  
14 combined response to the original and the supplemental.

15 So, we reached out to Bryan and asked if he'd be  
16 willing to let us file the combined response on Friday,  
17 which would be a week from today, instead of on Monday so  
18 that we could have time to gather the data and analyze the  
19 issues with regard to these additional custodians and other  
20 alleged spoliation issues.

21 So, he was cool with that. So, I e-mailed Laura  
22 yesterday and got a bounce-back. And then there was a phone  
23 number to call. So, I called that number and I believe it  
24 was Marianne. So, I asked Marianne if I could just forward  
25 my e-mail request to her. So, I did that. And then --

1 because I wanted -- obviously, Your Honor has to approve  
2 that.

3 THE COURT: Uh-huh.

4 MR. GAGE: And then, and then Bryan in response,  
5 when I copied him on the e-mail to Marianne, said, "Well,  
6 we're going to need to have a call with the Judge. We might  
7 as well just talk about this while we're on the call." And  
8 I thought that was a good idea.

9 THE COURT: Okay.

10 MR. GAGE: So, that's kind of where we are,  
11 Judge.

12 The only other issue that we would need to wrap into  
13 this, I think the supplemental motion was six pages. And I  
14 think we would just request an additional five in order to  
15 respond to the supplemental motion.

16 THE COURT: And how many pages, how many pages  
17 will that bring you up to then?

18 MR. GAGE: I would ask anybody to correct me if  
19 I'm wrong, but I think it would now be 35.

20 THE COURT: Okay.

21 MR. AYLSTOCK: I think that's right, Your Honor.  
22 This is Bryan. I think we were at five not including the  
23 signature block. But I'm, I'm okay with that. The only  
24 issue I wanted to alert you is as we continue to dig into  
25 this, there certainly seems to be more spoliation, at least

1 with regard to certain issues.

2 And I wasn't sure exactly how Your Honor wanted us to  
3 deal with it. Right now, we're struggling with these lab  
4 notebooks from these key studies that we had talked with  
5 Your Honor about before the break.

6 THE COURT: Right.

7 MR. AYLSTOCK: And we still don't have -- I don't  
8 know whether they existed. I can't really get a clear  
9 answer on whether they existed, whether they don't exist,  
10 whether they were in this other thing.

11 So, I think -- and, certainly, there's some more  
12 custodians that are slated to be produced than even what  
13 we've seen. I expect this to be more of a recurring issue.  
14 And I would just ask the Court's guidance for how maybe to  
15 handle it.

16 THE COURT: You know, I think this is very  
17 problematic if you really want to have some meaningful  
18 decision prior to your trial. I think if what you are  
19 seeking is money damages or some other sort of sanction that  
20 won't affect the Lewis trial, then we have plenty of time  
21 and I can, you know, let you figure out some sort of  
22 schedule that you want to go on as far as supplementing.

23 But I'm, you know, I'm trying to figure out what your  
24 needs really are as far as getting a ruling on this motion.

25 MR. AYLSTOCK: Well, maybe if I could get Your

1 Honor to ask Mr. Gage to give me an answer on whether, in  
2 fact, lab notebooks ever existed or whether they, for some  
3 reason, didn't keep lab notebooks on those three key studies  
4 that support -- that we've talked about, the 28-day and the  
5 91-day studies, --

6 THE COURT: Right.

7 MR. AYLSTOCK: -- then we could supplement in very  
8 short order. I mean, you probably haven't seen our  
9 supplementation. All we're doing is saying after we get  
10 confirmation that these files don't exist, telling the Court  
11 when those people were there and what their importance was  
12 because the -- a lot of this isn't in dispute as far as  
13 whether they exist or when the litigation hold went into  
14 effect. So, --

15 THE COURT: Okay, all right.

16 Well, Mr. Gage, can you answer that question?

17 MR. GAGE: Well, yes, Judge. And let me, let me  
18 just kind of backtrack.

19 I assume -- because I want to kind of follow up, Your  
20 Honor, if I may, on a question you kind of asked Bryan.  
21 And, that is, what is it he's seeking. And I'm not sure if  
22 he's -- maybe I didn't hear it. But I wasn't sure he was  
23 crystal clear.

24 It's my understanding, Judge, that the original motion  
25 certainly seeks sanctions that would impact the trial. In

1 other words, he is seeking sanctions that like, you know,  
2 adverse inference instruction, et cetera, or striking of  
3 defenses that would, that would absolutely have an impact on  
4 the Lewis trial.

5 So, to that extent, I just wanted to kind of clarify  
6 that for Your Honor and say that, you know, at some point,  
7 the supplementation has to stop, at least insofar as he  
8 needs a ruling prior to the trial. But, certainly, to  
9 continue to supplement and maybe seek sanctions for a future  
10 trial, that's certainly within, I guess, plaintiff's  
11 prerogative. So, I just wanted to kind of make that point.

12 THE COURT: Well, and you have to bear in mind  
13 that I will look at the motions. I haven't looked at  
14 anything yet. As I told you, I wait until everything is in  
15 or until the time frames have expired for everything to be  
16 in before I look at anything because I like to have a fresh  
17 view and not have read part of somebody's argument and --  
18 but you have to bear in mind with this type of a motion when  
19 you're asking for sanctions that are going to affect  
20 evidence at the trial or defenses at the trial, I'm going to  
21 have to be able to communicate with Judge Goodwin. And I'm  
22 going to have to take some lead from him on what he thinks  
23 would be appropriate in that regard because I really don't  
24 have anything to do with the trial.

25 So, there's going to have to be enough time for that to

1 occur as well. I just want to warn you. That's why I said  
2 I think we're talking about at least a couple of weeks.

3 MR. AYLSTOCK: Your Honor, that was my concern  
4 with -- I mean, I'm, I'm a reasonable guy. If they need --  
5 the supplementation simply said, "Here, here's some more  
6 names and here's what they do." I understand that may need  
7 more time and may need a few more pages. But I don't know  
8 that, you know, how much more time.

9 And I am seeking, you know, some relief in the Lewis  
10 trial. So, I really am looking for your guidance on that.  
11 And we can kind of end it maybe with the lab notebooks and  
12 then continue to supplement for the next trials or what have  
13 you. But --

14 THE COURT: Right. So, tell me again when is  
15 Lewis actually set to start?

16 MR. AYLSTOCK: February 10th, Your Honor.

17 THE COURT: February 10th.

18 MR. AYLSTOCK: That's when the jury selection  
19 begins.

20 THE COURT: I think realistically I'm going to  
21 have to have your materials by the 17th or the 20th of  
22 January. Let's see. Yeah, because, I mean, I'm certain  
23 that that -- I would think the latest, the latest that I  
24 would want to have your things would be --

25 (Interference)

1                   THE COURT: What is all the noise on this line?

2                   MR. AYLSTOCK: I don't know, Your Honor.

3                   THE COURT: Is anybody else hearing it or is it  
4 just me?

5                   MR. AYLSTOCK: I'm hearing it. It sounds like a  
6 buzzing noise.

7                   THE COURT: Buzzing and the high-pitch noises.

8                   I'm thinking -- let's see. Realistically, I'm going to  
9 have to have everybody's things no later than January the  
10 20th. And that's going to give me, then, just about two  
11 weeks.

12                  (Interference)

13                  THE COURT: Okay. I have no idea what that is.

14                  Because, you know, if, in fact, there, there is some  
15 impact on the trial, then you're going to need to have a few  
16 days before the trial to accommodate whatever that might be.  
17 Correct?

18                  MR. AYLSTOCK: That's, that's correct, Your Honor.  
19 Maybe if we could get the response on the 8th, on Wednesday,  
20 and then have our reply be due on the 20th, maybe that would  
21 be realistic.

22                  MR. GAGE: You know, Judge, here's my -- here's  
23 our situation, Judge. I think I had indicated to you  
24 earlier, you know, we have had a -- we have been working all  
25 Christmas and all New Year's to try to get a lot of stuff

1 done. And it's been very difficult because a lot of our  
2 employees are gone. I mean, I say a lot. I think virtually  
3 all of them are on vacation. And they all come back on  
4 Monday.

5 And for every event of spoliation that plaintiffs have  
6 alleged in both their original and in their supplemental  
7 motion, we obviously have a series of very detailed and, in  
8 some cases, laborious steps that we're taking to try to, as  
9 you might expect, disprove the, the claim.

10 And, so, it's putting us under a very difficult  
11 situation for them to supplement on January 27th -- I'm  
12 sorry -- December 27th and then for us to have to respond on  
13 the 8th.

14 So, we felt like if we could just get, you know, five  
15 business days, the 6th through the 10th, that would give us  
16 hopefully enough time to deal with those new issues.

17 MR. BERNARDO: If I may add -- this is Rich  
18 Bernardo -- Judge, the, the difficult and particularly  
19 frustrating aspect of all of this is the supplemental  
20 materials that were filed at the close of business on the  
21 27th were based upon information that we provided to  
22 plaintiffs even as per their supplement back in October.  
23 So, this is not new information.

24 This is information that was provided in very detailed  
25 charts and letters sent to the plaintiff that they actually

1 annexed to their supplement. So, it's, it's very  
2 frustrating that we're being put in a very short time frame  
3 to address these issues, particularly when plaintiffs have  
4 sat on the information.

5 THE COURT: Well, --

6 MR. AYLSTOCK: Well, --

7 THE COURT: Let me ask you, Mr. Aylstock, --

8 MR. AYLSTOCK: Yes, Your Honor.

9 THE COURT: -- if they have until Friday, the  
10 10th, do you think that you can have your reply by the 20th  
11 of January?

12 MR. AYLSTOCK: The issue with it is simply  
13 everything else going on in our lives with this trial and  
14 the, the Daubert responses and summary judgment responses  
15 and replies.

16 I mean, if you order it, Judge, of course I'll do it.  
17 I just want to produce the best work product possible. And  
18 they've had -- frankly, they will have had six full weeks to  
19 reply to a motion they normally get two weeks for. And I've  
20 been okay with all of that. I understand this is serious  
21 business. But I'm just asking for, you know, another couple  
22 of days given everything else going on. I don't think it's  
23 unreasonable, but I'll do what you say.

24 THE COURT: All right. Well, you know, you  
25 already had a deadline for your first response. And my

1 understanding was that the only reason you were extending  
2 that was just so you could do it all in one shot because now  
3 you have to supplement. And, so, there are six more pages  
4 you have to respond to, and you don't want to have to file  
5 two separate documents. You'd just like to do it all at one  
6 time.

7 Is that correct, Mr. Gage?

8 MR. GAGE: Yes, Your Honor.

9 THE COURT: And, and when were you supposed to  
10 have your first response completed?

11 MR. GAGE: Monday, the 6th.

12 THE COURT: Monday, the 6th. And the six pages,  
13 is it -- how many employees are we talking about?

14 MR. AYLSTOCK: I think, Your Honor, it's eight or  
15 so. It's really five pages.

16 THE COURT: All right, five pages. And how many,  
17 how many additional employees are you talking about?

18 MR. BERNARDO: It raises seven additional  
19 employees, Your Honor.

20 THE COURT: All right, seven additional employees.  
21 Well, I'm going to go ahead and give Ethicon until the 10th  
22 to get their response in.

23 And I'm going to give you, Mr. Aylstock, until the  
24 20th. If the 20th rolls around and you really can't get it  
25 done, I'll be -- I would be willing to give you an extra day

1 or two to get it in to me because really by that point, I'll  
2 be starting to go through everything. And, so, you know,  
3 your reply would be the last thing I would probably look at  
4 anyway.

5 But I don't want it much past the 20th because -- and,  
6 I mean, unless you, you know, unless you don't care about  
7 how long it takes to get things figured out. I can probably  
8 look at it pretty quickly. I'm, I'm planning on doing that.  
9 But I'm also going to have to have an opportunity to discuss  
10 the sanctions with Judge Goodwin.

11 And, so, I want to build in some time to do that and  
12 also give you-all, you know, five days or so before your  
13 trial starts to see, if sanctions are awarded, how you're  
14 going to modify your case to address that.

15 MR. AYLSTOCK: Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. BERNARDO: Judge, may we also request that  
18 there's an end to these supplemental opening briefs? The  
19 reason I raise this is we've received a number of e-mails  
20 from Mr. Aylstock that immediately seize upon a statement  
21 that we haven't located documents pursuant to an additional  
22 issue, so I'm going to add this as a supplement.

23 We're at a point now where when we say we haven't  
24 located something, that doesn't mean that it existed and has  
25 been destroyed. That simply means it may never have

1 existed. It takes some time to pin all of that down.

2 And I feel like we're at a stage where all of this is  
3 being, sort of hanging over us saying, "Well, if you don't  
4 respond immediately, I'm going to file another supplemental  
5 brief."

6 And there have been two issues that have already been  
7 raised. One is these lab notebooks that have been mentioned  
8 to plaintiffs for many months. And another is these XUS  
9 productions where we've produced material and said, "We've  
10 not identified materials for this country or this country."  
11 That doesn't mean that they've been destroyed. That just  
12 means that there may have been no filings. And it's  
13 prejudicing us to have to keep adding to our motion.

14 So, I would request that we could leave the state of  
15 the opening brief the way it is in response to that. And if  
16 there's something supplemental that comes in later on, we  
17 can deal with that.

18 MR. AYLSTOCK: And that's --

19 THE COURT: I think I've made it pretty clear what  
20 the time frames are. And there just -- if you want  
21 something decided in time for the Lewis trial, then I'm  
22 going to have to have everything by the 20th. And by  
23 everything, I mean the motion, the response, and the reply.

24 So, I don't -- I'm not talking about filing new things.  
25 If you want to file some new motions later on new documents,

1       that's fine. But I'm not going to be able to really rule on  
2       those before the Lewis case.

3                    MR. AYLSTOCK: I understand, Your Honor. And  
4       that's why I brought up the logistics of it because,  
5       frankly, the problem is I can't get a straight answer. I  
6       feel like I'm boxing shadows because I know, for example,  
7       that they -- from other documents, that they corresponded,  
8       they had issues with the South African regulatory agencies.

9                   Well, they tell me they can't locate them. Well, does  
10      that mean they're not there? The lab notebooks that we've  
11      talked about for these key studies, good lab practices  
12      require it. You know, I think they're there somewhere or  
13      they were. But I can't, I can't get them to say they're  
14      either gone or they never existed. So, I'm kind of left in  
15      a quandary.

16                  So, I mean, on those two things I would like for them  
17      to tell me or maybe I'll just do a 30(b)(6) and they can  
18      answer it under oath. But it would be a lot easier for them  
19      just to tell me whether they exist or not. That's all I'm  
20      trying to get at.

21                  MR. GAGE: Judge, let me make just a very quick  
22      point here. And you know Bryan and I get along pretty well  
23      considering our relative positions here.

24                  But, for example, on this South African deal, I think  
25      we sent them a letter or an e-mail, I don't know, what, 48

1 hours ago, 72 hours ago and, and notified them that under  
2 the OUS order that Your Honor entered, you know, that we  
3 didn't find anything for South Africa.

4 Well, 24 hours go by. We get an e-mail from Bryan that  
5 says, "All right. Does this mean that they're destroyed,"  
6 or whatever it was that he specifically requested.

7 Now, it takes us a little time to respond because we  
8 don't respond to Bryan's inquiries without making sure -- I  
9 mean, we don't -- we rarely give Bryan any sort of a  
10 substantive response without making sure that a group of us  
11 has a phone call, that we double-check everything because we  
12 don't want to make an erroneous representation on something  
13 like this.

14 So, when Bryan says he, he makes these requests and we  
15 don't get back to him, I mean, Judge, we're talking about 72  
16 hours at the most --

17 THE COURT: Right.

18 MR. GAGE: -- since he's made the request.

19 And, so, I would just ask Bryan -- I know the trial's  
20 coming up, but it's getting really tough to take a request  
21 on a Thursday and provide a full-natured, substantive  
22 response on a Friday.

23 MR. AYLSTOCK: Judge, really what I'm talking  
24 about is the lab notebooks. That has been an issue since  
25 July. And we brought up at the last hearing: Why can't you

1 tell me whether these lab notebooks exist or not? That's  
2 not a hard thing. I've been asking for -- literally, Mr.  
3 Anderson has asked for over a year I think.

4 MR. GAGE: Well, Judge, Rich can, can respond to  
5 that particular inquiry.

6 MR. BERNARDO: Yeah. On the lab notebooks, I  
7 think we have, Judge, gone well beyond what you had ordered  
8 before the holiday, and not only thought to provide  
9 plaintiffs with a Table of Contents, but we actually had  
10 somebody come back over the holiday, retrieve as many of the  
11 90 notebooks that we know exist or existed, and actually  
12 make copies of them, put somebody on a plane, have all of  
13 the lab notebooks that we were able to obtain brought to  
14 offices so they could take a look at them.

15 There were 30 of them that we weren't able to obtain.  
16 We had folks calling people all over the world during the  
17 holidays to try and get those back. We got another batch of  
18 those. Those are going to be sent by overnight mail so they  
19 can look at them on Monday.

20 And all of this is so that we can give them the  
21 notebooks that we understand exist for these individuals.  
22 If there are other notebooks that they have a basis to  
23 believe exist, they need to provide us information about  
24 that and we can talk about that and try and find those.

25 THE COURT: I think he's asking for the notebooks

1 that would apply to the three specific studies that he  
2 identified.

3 MR. BERNARDO: No, I understand that, Judge. And  
4 those would be, if they exist, among the notebooks that we  
5 have been providing. We've been trying to work with the  
6 people to go through the notebooks because they're very  
7 difficult to understand and it's a time-consuming process.

8 So, we're, we're still trying to look into this. We're  
9 trying to get them all the information that we have  
10 available to us in the time that we have it available.

11 THE COURT: So, you're saying if, if lab notebooks  
12 exist for these three studies, they would be in that vault  
13 of lab notebooks that we discussed prior to the holidays.  
14 Is that right?

15 MR. BERNARDO: That is our understanding, Judge.  
16 And what we're trying to do now is to take those notebooks  
17 and go back with these specific questions and talk to the  
18 people who own the notebooks now that they're back and see  
19 if there's anything that we're missing.

20 In other words, this isn't something where we're just  
21 not trying to answer the question. It's just something that  
22 because of the circumstances it is taking a lot of time to  
23 answer.

24 And it could very well be that this material is in  
25 these notebooks that we're all looking at, but we just don't

1 collectively have a sophisticated enough understanding of  
2 what's in them to appreciate that. That's what we're trying  
3 to pin down.

4 THE COURT: Okay. Well, I, you know, I doubt, Mr.  
5 Aylstock, that you're going to have an answer to that  
6 question in time for that to be part of your spoliation  
7 motion for the Lewis trial. But certainly that is something  
8 you can make a motion on later.

9 MR. AYLSTOCK: I mean, that -- I'm looking at the  
10 deposition notice from August. And this is the deposition  
11 on mesh properties. This is -- Mr. Barbolt is the designee  
12 and my partner is taking his deposition later this week.  
13 And it asks for all of this information. There's a document  
14 request.

15 So, it's not like I haven't been asking. It's not like  
16 I haven't been following up. And now we're on the eve of  
17 this deposition. We even had a conference with Your Honor  
18 about it, about the specific underlying data for this.

19 So, I appreciate -- and I don't -- I'm not here to  
20 throw stones at Rich or William specifically because I know  
21 that it's hard during the holidays. But this was done in  
22 August and we're just looking for an answer. Do those lab  
23 notebooks exist? Because they are key -- these, these are  
24 the, these studies that support key statements in the  
25 Instructions For Use that we say are false and misleading

1 and our experts say are false and misleading.

2 So, if they don't exist, they should know, okay, they  
3 don't exist, not look through 90 notebooks and see what you  
4 find. And that's, that's the position we're left in.

5 So, I mean, I just -- I would like, if Your Honor  
6 would, to tell them to get me an answer to that at least  
7 before Barbolt's deposition next week.

8 THE COURT: Well, I hear them saying that if that  
9 information exists, it's in that vault of notebooks and  
10 they're currently looking through the notebooks. So, you  
11 need to look through the notebooks as quickly as you can so  
12 that you can give an answer to Mr. Aylstock to that  
13 question.

14 MR. BERNARDO: And we are doing what we can.

15 THE COURT: All right.

16 MR. AYLSTOCK: On a related note, Your Honor, -- I  
17 know this has gone long, so I'll be real quick if Your Honor  
18 would indulge me because this does relate to this deposition  
19 next week.

20 THE COURT: Okay.

21 MR. AYLSTOCK: Mr. Barbolt is a veterinary -- he's  
22 a veterinary pathologist. But he's the designee for a  
23 30(b)(6) on these mesh properties, certain of those issues.  
24 He's also been named as a non-retained expert for Ethicon  
25 and, and designated as such.

1       What, what I don't want to have happen, I guess, is in  
2 some of the back and forth related to all of this, I've  
3 received e-mails saying, "Well, Dr. Barbolt is going to be  
4 prepared to discuss these certain studies, but he may not be  
5 prepared to discuss other things related to your notice."

6       And our notice has been outstanding since August. I  
7 just wanted -- and I think, Your Honor, we brought this up  
8 with some other 30(b)(6) designees. So, I just would like  
9 some clarification or maybe -- the notice that, that we have  
10 served has, is out there and we'd like Mr. Barbolt to be  
11 prepared to answer the topics on that notice that's been  
12 outstanding since August, and prepared to answer questions  
13 that may be related to his expert testimony, his expert  
14 designation in the Lewis case.

15           MR. GAGE: Your Honor, --

16           THE COURT: He's a 30(b)(6) witness?

17           MR. AYLSTOCK: Yes, Your Honor.

18           THE COURT: Well, then, I think the law is pretty  
19 clear on the duty to prepare and the duty to produce  
20 witnesses that can respond to the topics unless there's some  
21 sort of motion for protective order filed or, or something  
22 that you've agreed to. I mean, the law is clear.

23           MR. AYLSTOCK: Thank you, Your Honor.

24           MR. GAGE: Your Honor, this is William Gage.  
25 David Thomas who you know is -- he's on vacation this week,

1 but he's --

2 (Interference)

3 THE COURT: I don't know what is happening.

4 MR. AYLSTOCK: I don't know, Your Honor.

5 MR. GAGE: Well, he's the one that prepared  
6 (recording inaudible) and I have a very high degree of  
7 confidence that David is keenly aware of the  
8 responsibilities under the law. And I know personally that  
9 he has worked extraordinarily hard to make sure the witness  
10 is prepared. So, you know, if, if there's some disconnect  
11 that manifests at the depo, we'll have to deal with it.

12 The, the one thing that I do want to mention that, now  
13 that Bryan raises it is, you know, he was designated as a  
14 non-retained expert, but the depo that is taking place on  
15 Tuesday -- and I'm not sure if it's a two-day depo or if  
16 it's a one-day depo -- that's his 30(b)(6) depo.

17 And in keeping with Your Honor's -- your ruling, or the  
18 discussion that we had on December 6th, we're not making him  
19 available for an expert deposition because Your Honor may  
20 remember on December 6th we kind of went through Your  
21 Honor's parameters as to when a non-retained expert should  
22 be put up for additional deposition.

23 And, so, that's been a bit of a bone of contention.  
24 But we've been clear with the plaintiffs that, you know, his  
25 fact -- his 30(b)(6) depo is what's going forward next week.

1 And, as I said, he should be prepared to do what we  
2 understand he's supposed to do in that regard. And they  
3 have certainly prepped, you know, a tremendous amount.

4 THE COURT: Okay, all right. Well, you'll  
5 probably have to get into the deposition and see if problems  
6 arise. But if the deposition that's been noticed is a  
7 30(b)(6) deposition, that would be different than a  
8 deposition of a witness who's a non-retained expert. To me,  
9 that's two different types of depositions.

10 So, if they're not both noticed, then the one you're  
11 taking is the one you've noticed.

12 MR. AYLSTOCK: We've noticed them both, Your  
13 Honor. And, you know, the, the problem, I guess -- and I  
14 don't -- I'm trying to maybe avoid some issues -- is the  
15 30(b)(6) designation is exactly pretty much what his expert  
16 designation is. There's some differences, of course. But I  
17 don't want to -- and we have noticed both. I don't want to  
18 get in there and have a big fight over what answer he can  
19 provide or not. But we're just trying to get this done.

20 THE COURT: Well, I think if there's that much  
21 overlap, it should be fairly easy for you two to resolve it  
22 at the deposition.

23 MR. AYLSTOCK: I would hope so.

24 MR. GAGE: Judge, that, in fact -- that, that  
25 was -- I think David even corresponded with plaintiffs and

1 even noticed that there was a bunch of overlap. But -- so,  
2 I think, you know, as lawyers tend to be, we're all  
3 hyper-technical at times and we're all worried about stuff.

4       But my guess is once the depo is complete, if the  
5 plaintiffs feel like, you know, there was something that  
6 wasn't appropriate on the 30(b)(6) side, I'm sure they'll  
7 raise it.

8       And if, if they then want to commence with an expert  
9 deposition, then I would -- you know, we would ask that they  
10 follow what Your Honor set forth on December 6th, which was  
11 essentially the, the plaintiffs would need to show why or  
12 how the expert designation exceeds the scope of the previous  
13 deposition of the witness.

14           THE COURT: Okay, because we really don't have  
15 time to be taking multiple depositions of the same people if  
16 it can be avoided. And I would think you would all want to  
17 try to limit that.

18       So, why don't you get into the deposition and do the  
19 best you can. I don't know what day you're taking it. But,  
20 you know, it's likely that I will be here. So, if something  
21 comes up that you think is crucially important and requires  
22 some input from me, just call and I'll do what I can.

23           MR. AYLSTOCK: Thank you, Your Honor, --

24           MR. GAGE: Thank you.

25           MR. AYLSTOCK: -- for indulging us so long on a

1 Friday afternoon.

2 MR. GAGE: We do appreciate it, Judge.

3 THE COURT: You're wearing me out today.

4 MR. AYLSTOCK: I'm going to bed.

5 THE COURT: I know. And you don't sound like  
6 you're very well, Mr. Aylstock. You sound like --

7 MR. AYLSTOCK: I'm not. I'm not well at all.

8 THE COURT: Well, stay away from all your kids.  
9 They don't need to get sick, do they.

10 MR. AYLSTOCK: No, no, they don't.

11 THE COURT: All right. Well, you-all have a nice  
12 weekend and let me know if you need something next week. I  
13 will go ahead and do the order on the first part of our  
14 discussion. I'm not going to do an order on anything else  
15 unless you believe there's some need to do that.

16 MR. AYLSTOCK: No, Judge, we don't.

17 MR. GAGE: Thank you, Judge. We appreciate your  
18 time.

19 THE COURT: Thank you. Good-bye.

20 (Proceedings concluded)

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1 I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

6

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s\Lisa A. CookJanuary 7, 2014

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Reporter

Date

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